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In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of the Department of Defense and the Department of the Army, files this supplemental brief to address the effect on this case of the Department of Homeland Security Appropriations Act, 2010 (Act), Pub. L. No. 111-83, 123 Stat. 2142, which was signed by the President on October 28, 2009, and a certification issued pursuant to Section 565 of that Act by the Secretary of Defense (Secretary) on November 13, 2009. Section 565 and the Secretary's certification are reproduced as appendices to this brief. The Act and the Secretary's certification require that the photographs currently at issue in this case be exempt from mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The judgment of the court

of appeals therefore should be vacated and the case remanded to the court of appeals for further consideration in light of the new legislation and the Secretary's certification.

A. Respondents filed this action under FOIA in district court seeking the release of various agency records, including the 21 photographic records presently at issue, which relate to allegations of abuse and mistreatment of detainees in United States custody overseas. Pet. 3, 6-7 & n.5; Reply Br. 6 n.2. The 21 photographs, which were taken between 2002 and 2004 and are contained in files concerning investigations conducted by the Army's Criminal Investigation Command, depict detainees held in United States military custody in Iraq and Afghanistan. See Pet. App. 161a-162a, 169a-170a; Pet. 6-7; Reply Br. 6 n.2.

Petitioners argued, *inter alia*, that the photographs are exempt from mandatory disclosure under FOIA Exemption 7(F) because they are records compiled for law-enforcement purposes and their disclosure under FOIA "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). The district court disagreed, found Exemption 7(F) inapplicable, and ordered petitioners to produce the 21 photographs under FOIA. Pet. App. 62a, 64a; see Pet. 4-5, 9.

The court of appeals affirmed. Pet. App. 1a-60a. The court accepted for the purpose of its opinion that disclosure of the 21 photographs could reasonably be expected to endanger the lives and physical safety of United States military and civilian personnel overseas. *Id.* at 10a n.3. The court nevertheless held that Exemption 7(F) did not exempt the photographs from mandatory disclosure because, in its view, Exemption 7(F) requires that the government "identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.* at

18a. Concluding that the government failed to "identify a single person and say that the release * * * could reasonably be expected to endanger that person's life or physical safety," the court found Exemption 7(F) inapplicable. *Ibid.*

B. 1. In response to the decision of the court of appeals, several legislative provisions were introduced in Congress to provide the Secretary with new authority to exempt from mandatory disclosure under FOIA detainee photographs such as those presently at issue. See Pet. 11 n.8. On October 28, 2009, the President signed into law the Department of Homeland Security Appropriations Act, 2010. Section 565 of that Act vests the Secretary with authority to issue a certification with respect to certain photographic records. If such a certification is issued, the covered records are not subject to disclosure under FOIA.

More specifically, Section 565(b) states that, "[n]otwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." App., *infra*, 1a.

Section 565(c)(1) defines "protected document" to mean "any record" that is a photograph (1) taken between September 11, 2001 and January 22, 2009, that "relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States," (2) "for which the Secretary of Defense has issued a certification" under Section 565(d). App., *infra*, 1a-2a.

Section 565(d) states that "the Secretary of Defense shall issue a certification" with respect to such a photograph if the Secretary "determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees

of the United States Government deployed outside of the United States." App., *infra*, 2a.

Section 565 further provides that its provisions "shall take effect on the date of enactment," *i.e.*, October 28, 2009, and "apply to any protected document." App., *infra*, 3a (Section 565(f)).

2. On November 13, 2009, the Secretary personally exercised his certification authority under Section 565 with respect to a collection of photographs, including the 21 photographs now at issue before this Court and the 23 additional photographs identified in the decision of the court of appeals. App., *infra*, 4a-5a; cf. Pet. App. 6a & n.2 (discussing photographs).[1]

The Secretary's certification explains that the 44 photographs referred to by the court of appeals—*i.e.*, the 21 photographs that were the immediate subject of the government's appeal and the 23 other photographs noted by the court in its decision, see Pet. App. 6a & n.2—were taken between September 11, 2001 and January 22, 2009, and relate to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States, in operations outside the United States. App., *infra*, 4a. The certification also states that the Secretary has "determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United

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[1] The Secretary may, but did not in this case, delegate his certification authority under Section 565 to a subordinate official in the Department of Defense, including the Deputy Secretary of Defense. 10 U.S.C. 113(d) (authorizing the Secretary to delegate "any of his functions or duties" to such persons within the Department of Defense as he may designate "[u]nless specifically prohibited by law"); see 10 U.S.C. 132(b).

States." *Id.* at 4a-5a. Based on that determination, the Secretary has concluded that the photographs are "protected documents." *Id.* at 5a. Pursuant to Section 565, those documents are exempt from mandatory disclosure under FOIA. *Ibid.*

C. Section 565 and the Secretary's certification govern the disposition of this case. Congress provided that Section 565 would take effect upon enactment and specified that its provisions apply to "any protected document" in "any proceeding under [FOIA]." App., *infra*, 1a, 3a (Section 565(b) and (f)). Section 565 therefore authorizes the Secretary to exempt from mandatory FOIA disclosure any records in the present proceeding that qualify as "protected documents."[2] In light of the Secretary's certification, the 21 photographic records that the district court ordered disclosed and that are the subject of the government's petition for a writ of certiorari are "protected documents."

As explained in the government's petition and reply brief, plenary review by this Court was warranted before the intervening legislation because the court of appeals

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[2] Neither the Act nor the Secretary's certification implicates retroactivity concerns. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994) ("When [an] intervening statute authorizes or affects the propriety of prospective relief, application of the new provision" is "unquestionably proper" and "not retroactive."); *Southwest Ctr. for Biological Diversity* v. *United States Dep't of Agric.*, 314 F.3d 1060, 1061-1062 (9th Cir. 2002) (holding that Congress's enactment of a statutory provision authorizing the withholding of information in response to a FOIA request applies to pending FOIA proceedings even when Congress did not clearly express its intent to apply the provision to pending cases); cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (Congress may alter operative law to govern cases still pending on appellate review.); *Miller* v. *French*, 530 U.S. 327, 347-348 (2000) (Congress may modify the prospective operation of an injunctive order even after the order has become final and unreviewable.).

erred in engrafting on to Exemption 7(F) an extra-textual requirement of victim specificity. Pet. 16-30; Reply Br. 2-10. The court of appeals' error was particularly significant in light of the conclusion of the President and the Nation's highest-ranking military officers that disclosure of the photographs at issue would pose a significant risk to American military and civilian personnel overseas. Pet. 14-15, 30-32; Reply Br. 10.

But given Congress's enactment of intervening legislation resolving the present dispute by providing for withholding of the records at issue, the Court now has no occasion to address the proper construction of Exemption 7(F) as set forth in the government's petition. The appropriate disposition, after these events, is for this Court to grant the certiorari petition, vacate the judgment of the court of appeals, and remand for further proceedings (GVR) in light of the intervening legislation. See *Lords Landing Vill. Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (GVR order appropriate where intervening developments give rise to reasonable probability that lower court's judgment would change if it were "given the opportunity for further consideration"); *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (explaining that this Court has ordered GVR for a "wide range of developments" including "new federal statutes"); *id.* at 182 (Scalia, J., dissenting) (noting the Court's practice of vacating in light of intervening statute).

This Court has decided in numerous cases affected by intervening legislation to grant certiorari, vacate the judgment of the lower court, and remand to allow the lower court to consider the effect of the new legislation in the first

instance.[3] Indeed, in circumstances analogous to those here, the Court granted, vacated, and remanded to permit further consideration of a FOIA disclosure order in light of intervening legislation that directed that no statute shall be construed to require the disclosure of certain tax-return processing information when the Secretary of the Treasury determines that such disclosure would seriously impair assessment, collection, or enforcement under the internal revenue laws. See *Bureau of Econ. Analysis* v. *Long*, 454 U.S. 934 (1981) (GVR in light of Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701, 95 Stat. 340 (amending 26 U.S.C. 6103(b)(2)), vacating *Long* v. *Bureau of Econ. Analysis*, 646 F.2d 1310 (9th Cir.) (affirming FOIA disclosure order)). Cf. *Department of Justice* v. *City of Chi.*, 537 U.S. 1229 (2003) (vacating and remanding in FOIA case for further consideration in light of intervening legislation after having granted certiorari to review *City of Chicago* v. *United States Department of Treasury*, 287 F.3d 628 (7th Cir.), amended, 297 F.3d 672 (7th Cir. 2002)). The same disposition is appropriate here.

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[3] See, *e.g.*, *Diawara* v. *Gonzales*, 546 U.S. 1086 (2006); *American Bible Soc'y* v. *Richie*, 522 U.S. 1011 (1997); *Doherty* v. *Pennington*, 522 U.S. 909 (1997); *K.R.* v. *Anderson Cmty. Sch. Corp.*, 521 U.S. 1114 (1997); *American Life & Cas. Ins. Co.* v. *Trostel*, 519 U.S. 1104 (1997); *Fields* v. *Battle*, 519 U.S. 801 (1996); *Dennler* v. *Trippet*, 503 U.S. 978, amended, 503 U.S. 1003 (1992); *Holland* v. *First Va. Banks, Inc.*, 502 U.S. 1086 (1992); *INS* v. *National Ctr. for Immigrants' Rights*, 481 U.S. 1009 (1987); see also *Heckler* v. *Lopez*, 469 U.S. 1082 (1984) (GVR with instructions in light of intervening legislation); cf. *Mouelle* v. *Gonzales*, 548 U.S. 901 (2006) (GVR for intervening regulatory provision); *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006) (same); *Slekis* v. *Thomas*, 525 U.S. 1098 (1999) (same).

* * * * *

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of Section 565 of the Department of Homeland Security Appropriations Act, 2010, and the certification by the Secretary of Defense pursuant to that provision.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX A

1. The Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, provides in pertinent part:

SEC. 565. (a) SHORT TITLE.—This section may be cited as the "Protected National Security Documents Act of 2009".

(b) Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code or any proceeding under that section.

(c) DEFINITIONS.—In this section:

(1) PROTECTED DOCUMENT.—The term "protected document" means any record—

(A) for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States; and

(B) that is a photograph that—

(i) was taken during the period beginning on September 11, 2001, through January 22, 2009; and

(ii) relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United

States in operations outside of the United States.

(2) PHOTOGRAPH.—The term "photograph" encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

(d) CERTIFICATION.—

(1) IN GENERAL.—For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

(2) CERTIFICATION EXPIRATION.—A certification and a renewal of a certification issued pursuant to subsection (d)(3) shall expire 3 years after the date on which the certification or renewal, is issued by the Secretary of Defense.

(3) CERTIFICATION RENEWAL.—The Secretary of Defense may issue—

(A) a renewal of a certification at any time; and

(B) more than 1 renewal of a certification.

(4) NOTICE TO CONGRESS.—The Secretary of Defense shall provide Congress a timely notice of the Secretary's issuance of a certification and of a renewal of a certification.

(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to preclude the voluntary disclosure of a protected document.

(f) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act and apply to any protected document.

APPENDIX B

CERTIFICATION OF THE SECRETARY OF DEFENSE

This certification pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) ("DHS Appropriations Act")) assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in *American Civil Liberties Union* v. *Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union* v. *Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), petition for cert. filed, 78 U.S.L.W. 3083 (Aug. 7, 2009) (No. 09-160).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the

United States Government deployed outside the United States.

Therefore, these photographs meet the standard for protected documents, as that term is defined in section 565(c)(1) of the DHS Appropriations Act and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C § 552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification be provided to Congress.

Date: 11/13/09 /s/ ROBERT M. GATES
Secretary of Defense